

**STATE OF MICHIGAN
IN THE SUPREME COURT**

SONG YU and SANG CHUNG,

Plaintiff-Appellees,

v

Supreme Court No. 155811
Court of Appeals No. 331570
Ingham County Circuit No. 14-1421-CK

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN, a Michigan
Insurance company,

Defendant-Appellant.

**PLAINTIFF-APPELLEES' ANSWER TO DEFENDANT-APPELLANT FARM BUREAU
GENERAL INSURANCE COMPANY OF MICHIGAN'S APPLICATION FOR LEAVE
TO APPEAL**

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
COUNTER-STATEMENT OF QUESTIONS INVOLVED.....	v
INTRODUCTION	1
STATEMENT OF FACTS AND PROCEEDINGS	7
A. BACKGROUND FACTS.....	7
B. DEFENDANT’S STATED REASONS, FOR DENIAL OF PLAINTIFFS’ DECEMBER 2013 CLAIM AND RELEVANT DEPOSITION TESTIMONY OF DEFENDANT’S AGENTS IN THAT REGARD	10
C. THE PARTIES’ SUMMARY DISPOSITION MOTIONS; THE TRIAL COURT’S RULING; THE PLAINTIFFS’ APPEAL; THE COURT OF APPEALS DECISION; AND DEFENDANT’S APPLICATION FOR LEAVE TO APPEAL	22
ARGUMENT	24
I. PLAINTIFFS’ CLAIM OF EQUITABLE ESTOPPEL SHOULD PREVAIL OVER DEFENDANT’S DENIAL OF PLAINTIFFS’ DECEMBER 2013 WATER DAMAGE CLAIM WHEN DEFENDANT HAD KNOWLEDGE OF OR ACCESS TO KNOWLEDGE OF FACTS AND CIRCUMSTANCES ON WHICH ITS DENIAL WAS BASED, IN FEBRUARY OF 2013, APPROXIMATELY NINE MONTHS BEFORE THE DEFENDANT RENEWED THE PLAINTIFFS’ “SPECIAL PERILS” HOMEOWNERS INSURANCE POLICY IN NOVEMBER OF 2013.	24
A. STANDARD OF REVIEW	24
B. THE MICHIGAN LAW OF EQUITABLE ESTOPPEL	24
C. THE INACCURATE FACTUAL ALLEGATIONS AND UNSUPPORTED LEGAL ARGUMENTS IN DEFENDANT’S APPLICATION FOR LEAVE TO APPEAL	26
II. THE AMBIGUOUS OR UNAMBIGUOUS LANGUAGE OF THE PARTIES’ “SPECIAL PERILS” HOMEOWNERS INSURANCE CONTRACT PROVIDED COVERAGE FOR THE PLAINTIFFS’ SECOND HOME ON WEST LAKE, ON DECEMBER 25, 2013 WHEN PLAINTIFFS WERE OCCUPYING THEIR LAKE HOME (AS OCCUPIED IS DEFINED UNDER THE PARTIES’ INSURANCE POLICY) AND WHEN PLAINTIFFS’ LAKE HOME WAS NOT VACANT (AS VACANT IS DEFINED UNDER THE PARTIES’ INSURANCE POLICY).....	36
A. STANDARD OF REVIEW	37

B. ON DECEMBER 25, 2013 PLAINTIFFS WERE OCCUPYING THEIR LAKE HOME (AS OCCUPIED IS DEFINED UNDER THE PARTIES' INSURANCE POLICY) AND PLAINTIFFS' LAKE HOME WAS NOT VACANT (AS VACANT IS DEFINED UNDER THE PARTIES' INSURANCE POLICY).....	37
C. DISCUSSION OF THE DIFFERENCE BETWEEN THE DOCTRINES OF WAIVER AND OF EQUITABLE ESTOPPEL AND THEIR APPLICATION TO THE FACTS OF THIS CASE.....	37
CONCLUSION.....	39

INDEX OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Snarski</i> , 174 Mich. App. 148, 435 NW2d 408 (1988).....	25
<i>Auto-Owners Ins Co v Robert E. McGowan Trust</i> ; 2014 WL 2040025.....	38
<i>Brown v Loveman</i> , 260 Mich. App. 576, 599, 680 NW 2d 432 (2004).....	36
<i>Charter Twp of Harrison v Calisi</i> , 121 Mich. App 777, 787; 329 NW2d488 (1982).....	39
<i>Dahrooge v. Rochester-German Ins. Co.</i> , 177 Mich. 442, 451-452, 143 N.W. 608 (1913).....	37
<i>Fleckenstein v. Citizens' Mut. Automobile Ins. Co.</i> , 326 Mich. 591, 599, 40 NW2d 733 (1950)	25
<i>Grosse Pointe Park v. Michigan Muni. Liability & Prop. Pool</i> , 473 Mich. 188, 204, 224, 702 N.W.2d 106 (2005)	37
<i>Hassberger v Gen Builder's Supply Co</i> , 213 Mich. 489; 182 NW 27 (1921).....	38
<i>Heniser v Frankenmuth Mut Ins Co</i> , 449 Mich 155; 534 NW2d 502 (1995).....	30
<i>Lichon v American Universal Ins Co</i> , 435 Mich. 408, 415; 459 NW2d 288 (1990).....	38, 39
<i>Mate v Wolverine Mut Ins Co</i> , 233 Mich. App 14, 23; 592 NW2d 379 (1998).....	38
<i>McDonald v Farm Bureau Ins Co</i> , 480 Mich. 191, 204; 747 NW2d 811 (2008).....	37
<i>McGrath v Allstate Ins Co</i> , 290 Mich App 434, 441; 802 NW2d 619, 623 (2010)	30
<i>McGrath v Allstate Insurance</i> , 802 NW2d 619, 290 Mich. App. 434 (2010).....	32
<i>McNeel v Farm Bureau Gen Ins Co of Michigan</i> , 289 Mich App 76; 795 NW2d 205 (2010) ...	3
<i>Morales v Auto-Owners Ins Co</i> , 458 Mich. 288, 295; 582 NW2d 776 (1998)	38, 39
<i>Morales v Auto-Owners Ins Co</i> , 458 Mich. 288; 582 NW2d 776.....	24
<i>Parmet Homes, Inc. v. Republic Ins. Co.</i> , 111 Mich. App. 140, 148, 314 N.W.2d 453 (1981) .	38
<i>Pastucha v Roth</i> , 290 Mich. 1,9,287 NW 355 (1937).....	25

<i>Pro-Staffers, Inc. v. Premier Mfg. Support Services, Inc.</i> , 252 Mich. App. 318, 328-329, 651 NW 2d 811 (2002)	36
<i>Rory v Continental Ins. Co.</i> , 473 Mich. 457,464; 703 NW2d 23 (2005)	37
<i>Staffan v. Cigarmakers' Int'l Union of America</i> , 204 Mich. 1, 169 NW 876 (1918)	25
<i>Vashaj v Farm Bureau Gen Ins Co of Michigan</i> , 284 Mich App 513; 773 NW2d 78 (2009)	3
<i>Vushaj v Farm Bureau General Ins. Co. of Michigan</i> , 773 NW2d 758, 284 Mich. App. 513, (2009)	35
<i>Wallace v Fraternal Mystic Circle</i> , 121 Mich. 263, 269,80 NW 6 (1989).....	25
<i>West Am Ins Co v Meridian Mut Ins Co</i> , 230 Mich. App 305, 310; 583 NW2d 548(1988).....	38
<i>Woodruff v State Farm Mut Auto Ins Co</i> ; 2014 WL 2218722	38
 Rules	
MCR 2.116(C)(10).....	24

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. SHOULD PLAINTIFFS' CLAIM OF EQUITABLE ESTOPPEL PREVAIL OVER DEFENDANT'S DENIAL OF PLAINTIFFS' DECEMBER 2013 WATER DAMAGE CLAIM WHEN DEFENDANT HAD KNOWLEDGE OF OR ACCESS TO KNOWLEDGE OF FACTS AND CIRCUMSTANCES ON WHICH ITS DENIAL WAS BASED, IN FEBRUARY OF 2013, APPROXIMATELY NINE MONTHS BEFORE THE DEFENDANT RENEWED THE PLAINTIFFS' "SPECIAL PERILS" HOMEOWNERS INSURANCE POLICY IN NOVEMBER OF 2013.**

Defendant/Appellant says: No

Plaintiffs/Appellees say: Yes

The Trial Court said: No

The Court of Appeals, in a split decision, said: Yes

- II. DID THE AMBIGUOUS OR UNAMBIGUOUS LANGUAGE OF THE PARTIES' "SPECIAL PERILS" HOMEOWNERS INSURANCE CONTRACT PROVIDE COVERAGE FOR THE PLAINTIFFS' SECOND HOME ON WEST LAKE, ON DECEMBER 25, 2013 WHEN PLAINTIFFS WERE OCCUPYING THEIR LAKE HOME (AS OCCUPANCY IS DEFINED UNDER THE PARTIES' INSURANCE POLICY) AND WHEN PLAINTIFFS' LAKE HOME WAS NOT VACANT (AS VACANT IS DEFINED UNDER THE PARTIES' INSURANCE POLICY).**

Defendant/Appellant says: No

Plaintiffs/Appellees say: Yes

The Trial Court said: No

The Court of Appeals did not address the question.

INTRODUCTION

Defendant insured Plaintiffs' home on West Lake, in Portage, Michigan, commencing in December 2006. Plaintiffs' made two claims for water damage to their lake home which occurred in February of 2013 and in December of 2013. Defendant paid the first claim but denied the second on grounds that Plaintiffs were not residing in the home at the time the water damage occurred, that the home was "vacant" at the time the damage occurred and that the home had been unoccupied for a period of more than 6 months at the time the damage occurred.

Plaintiffs filed a breach of contract complaint alleging that they were occupying their lake home as their second (vacation) home during all of 2013; that their lake home was not vacant as "vacant" was defined under the terms of the subject Homeowners Insurance Policy; and that their lake home was not unoccupied¹. Plaintiffs' complaint also alleged that Defendant was equitably estopped from denying Plaintiffs' claim for the December 2013 water damage loss because Defendant had paid Plaintiffs' February 2013 claim for water damage and because Defendant had thereafter (nine months later) renewed Plaintiffs' Homeowners Policy.

Plaintiffs brought a Summary Disposition Motion requesting that the Trial Court enter a declaratory judgment holding:

1. That Defendant is obligated under unambiguous and/or ambiguous terms of the subject Homeowners Policy to pay Plaintiffs' claim for the water damage loss to Plaintiffs' lake home which occurred in December 2013; and/or
2. That Defendant is equitably estopped from denying Plaintiffs' second water damage claim because Defendant paid Plaintiffs' first water damage claim and because Defendants thereafter renewed Plaintiffs' Homeowners Policy, after it

¹ "Occupied" is defined under the terms of the insurance policy, but unoccupied is not.

knew or should have known that the home on West Lake was being used as Plaintiffs' second (vacation) home.

Defendant filed a Counter-Motion for Summary Disposition arguing:

1. That Plaintiffs' December 2013 claim was not covered by the terms and conditions of the Homeowners Policy because:
 - a. The lake home was not the Plaintiffs' "residence premises" at the time the water damage occurred;
 - b. The insurance policy excludes losses that occur because of increased hazards to a building that is "vacant" or unoccupied; and
2. That Plaintiffs' claim of equitable estoppel should be denied because there was no evidence that Defendant had acted "intentionally or was grossly negligent."

At a hearing on January 6, 2016, the Trial Court denied Plaintiffs' Motion for Summary Disposition and granted Defendant's Motion for Summary Disposition. The stated grounds for the Trial Court's grant of Defendant's motion was:

1. That Plaintiffs did "not meet the definition of reside . . . under the policy";
2. That Plaintiffs' home was "vacant" at the time of the second water damage loss;
3. That Plaintiffs' home was unoccupied at the time of the second water damage loss; and
4. That the principle of equitable estoppel could not be invoked because there was no evidence that the Defendant had "intentionally abandoned some policy coverage requirement."

Plaintiffs appealed, and the issues before the Court of Appeals included:

1. Does the principle of equitable estoppel require that Plaintiffs prove that the Defendant “intentionally abandoned some policy coverage requirement?”
2. Can the principle of equitable estoppel be invoked because of the Defendant’s negligence?
3. Is there a material issue of fact as to whether Plaintiffs’ lake home was “vacant” (as vacant is defined under the terms of the subject insurance policy) at the time of the second water damage loss?
4. Is there a material issue of fact as to whether Plaintiffs’ lake home was unoccupied at the time of the second water damage loss?

On April 11, 2017 the Court of Appeals issued its (2 - 1) unpublished opinion (copy at Exhibit 9) which stated in part:

Because we agree with plaintiffs’ estoppel argument, we need not address the applicability of the stated reasons for denial of coverage. We do note that, in the absence of a valid estoppel argument, our decision in *Vashaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513; 773 NW2d 78 (2009), is somewhat persuasive in favor of defendant. But, by the same token, our decision in *McNeel v Farm Bureau Gen Ins Co of Michigan*, 289 Mich App 76; 795 NW2d 205 (2010), would seem to favor plaintiffs, at least on the issue of “vacant” and “unoccupied.”

In any event, as stated above, we agree that, under the facts of this case, defendant is estopped from denying coverage.

...

We are not necessarily persuaded by plaintiffs’ argument that they justifiably relied upon the belief that coverage was in effect in December 2013 because their living circumstances were the same in February 2013, when the first claim was paid, as it had been for some time before. But, we are persuaded that defendant is estopped from denying coverage based upon (1) its knowledge in February 2013, (2) that, despite this knowledge, it renewed the policy in December 2013, and (3) after cancelling the policy and refunding plaintiffs a pro rata share of the premium, defendant retained the premium for the time period in which the loss occurred.

The dissenting opinion of Judge Servitto stated in part:

. . . In the addendum to plaintiff's policy, under Section I. Conditions, it is stated that plaintiffs' duties after loss include the duty to set forth in a sworn statement of proof of loss "changes in title or occupancy of the property during the term of the policy." There is no indication that after the February 2013 water incident that plaintiffs advised defendants in a sworn statement of proof of loss that the occupancy of the Forest Drive home had changed from full time, year round, to vacation home.

In sum, plaintiffs were advised on December 16, 2013, that their policy was being cancelled because the dwelling "has been unoccupied for more than 60- days or is vacant." They did not know of water damage to their home (the second occurrence) until December 25, 2013. Plaintiffs were aware of defendant's position that the home was unoccupied or vacant when the December 2013 water event occurred. Defendant's payment of the February 2013 water damage claim did not include plaintiffs into believing that they would nonetheless have coverage given the clear language of the policy. It appears that plaintiffs were not forthright with the adjuster and defendant in an attempt to avoid the clear language of the policy. This is supported by the testimony that plaintiffs merely advised the adjuster that they were in the process of moving to a new home in February 2013 and not that they had moved to the Lansing area in 2010. It is also supported by the testimony that plaintiffs first advised defendant that they did not reside at the Forest Drive home as their "residence premises" in April of 2014.

Firstly, Judge Servitto states that Plaintiffs failed to advise Defendant, during its investigation of the February 2013 water damage loss, that "occupancy of the Forest drive home had changed from full time, year round, to vacation home" as required by "Section I. Conditions" of the subject insurance policy. That contention ignores the fact that Defendant did not ask Plaintiffs to provide a "signed and notarized Sworn Statement in Proof of Amount of Loss" with respect to the February 2013 water damage loss. In this regard, the applicable section of the parties' insurance policy states (see page 1 of 2 of amendatory endorsement GH66321012 which is part of Exhibit E to Defendant's Application for Leave to Appeal).

SECTION I - CONDITIONS

Paragraph g. of 2. Your duties after Loss is deleted and replaced by the following:

g. send to us, within 60 days after our request, your signed and notarized Sworn Statement in Proof of Amount of Loss which sets forth:

...
 (4) changes in title or occupancy of the property during the term of the policy;
(emphasis added)

In fact, Defendant never requested that Plaintiffs provide a “sworn statement” with regard to the February 2013 loss. Because Defendant never asked for (i.e. waived) a “signed and notarized Sworn Statement in Proof and Amount of Loss,” Judge Servitto’s contention the Plaintiffs violated a condition of the policy, by failing to provide one in February of 2013, is in error².

Secondly, there is no evidence to support Judge Servitto’s conclusion that Plaintiffs were aware of Defendant’s “position” that Plaintiffs’ home was unoccupied or vacant before the December 25, 2013 water damage occurred. Though there is a letter from Defendant to Plaintiffs, in that regard, dated December 16, 2013, Song Yu’s Affidavit (see paragraphs 13 and 14 of Exhibit 1) states that Plaintiffs did not receive that letter until after the December 25, 2013 water damage had occurred.

Thirdly, with respect to Judge Servitto’s statement that: “It appears that Plaintiffs were not forthright with the adjuster and Defendant in an attempt to avoid the clear language of the policy,” what evidence supports that conclusion? Need it be said that the difference in the knowledge, experience and understanding of Defendant’s adjuster and Plaintiffs, in February of 2013, with respect to determining the plain meaning of the subject insurance policy, was marked. Song Yu had no motive to mislead adjuster Ricks when Ms. Ricks conducted her February 7, 2013 investigation of the first water damage loss. Why would he? In addition, there are no

² If Defendant had asked Plaintiffs for such a sworn statement and Plaintiffs would have misrepresented the fact that they had moved their full time residence to the Lansing area 2-1/2 years earlier then there would be support for Judge Servio’s conclusion. However, to conclude that Plaintiffs were not being “forthright” because (among other things) they did not complete a sworn statement of proof of loss which Farm Bureau did not ask them to complete (i.e. waived) is in error.

indications in Ms. Ricks' investigative report that Song Yu failed to cooperate fully with her investigation or that Song Yu didn't "forthrightly" answer all the questions she asked. Rather, a review of Ms. Ricks' investigative report (at Exhibit 8) reveals that Ms. Ricks incorrectly "assumed" that Plaintiffs were only then moving their principal residence by failing, among other things, to ask Song Yu:

1. Whether Plaintiffs were living full time in their lake home in February 2013; and
2. If not, for how long had Plaintiffs not been living full time in their lake home.

In summary, the preponderance of evidence indicates that adjuster Ricks' investigation was perfunctory; that she did not ask Song Yu whether Plaintiffs were living full time in their West Lake home in February of 2013; and that she did not ask for how long Plaintiffs had not been living full time in their lake home. In light of these facts, Judge Servitto's conclusion that Plaintiff Song Yu was not being forthright with adjuster Ricks, does not hold up under scrutiny.

STATEMENT OF FACTS AND PROCEEDINGS

A. BACKGROUND FACTS

On December 8, 2006, Plaintiff-Appellees, Dr. Song Yu and his wife Sang Chung (hereafter Plaintiffs), purchased real property (the “residence premises”³) including a home (“dwelling”⁴) and garage (“other structure”⁵) with frontage on West Lake and with the address of 1724 Forest Drive, Portage, Michigan (a copy of the Deed of Purchase is Exhibit A to Song Yu’s November 11, 2015 Affidavit⁶). Song Yu’s 27-paragraph affidavit (at Exhibit 1) also evidences the following additional facts:

1. At the time of purchase, (see paragraph 3 of Exhibit 1), Plaintiffs began to insure the “residence premises” under a “Homeowners Policy” issued by Defendant-Appellant, Farm Bureau General Insurance Company of Michigan (hereinafter Defendant). A certified copy of the “Homeowners Policy” is at Exhibit 3 to Plaintiffs’ Complaint in the Circuit Court.
2. At the time Plaintiffs purchased their West Lake home, Song Yu was working as a family practice physician at Bronson Hospital in Kalamazoo. Plaintiffs resided in the home as their primary residence from December of 2006 until June of 2010 (see paragraphs 2 and 3).
3. In June of 2010 Song Yu accepted employment with Sparrow Hospital in Lansing, and the Plaintiffs moved to an apartment in Okemos. In early 2013, after living in the apartment for approximately 2-1/2 years, Plaintiffs began

³ As defined in the “Homeowners Policy” between the parties.

⁴ As used in the policy definition of “residence premises.”

⁵ As used in the policy definition of “residence premises.”

⁶ Attached at Exhibit 1 is a copy of Dr. Yu’s November 11, 2015 Affidavit (plus exhibits to the Affidavit). This Affidavit was also attached (as Exhibit 5) to Plaintiffs’ Brief in Support of their November 11, 2015 Motion for Summary Disposition.

shopping for a new home in the East Lansing area; and on March 29, 2013, they closed the purchase of the home at 1866 Cricket Lane in East Lansing (see paragraphs 4, 5 and 6 and Exhibit B to Song Yu's Affidavit at Exhibit 1).

4. After moving from Portage to the Lansing area in 2010, Plaintiffs continued to use their home on West Lake as their vacation or get-away residence, and they continued to keep "furnishings" in their home and garage; continued to keep the "utilities" on; and their home and garage continued to contain the "amenities minimally necessary for human inhabitation" (see paragraphs 5 and 7 and also see the definition of "vacant" in the parties' insurance contract).
5. In early 2013 Plaintiffs decided to offer their West Lake home for sale. On February 7, 2013, Dr. Yu met a realtor (Scott Lakey) at the West Lake home for the purpose of listing it for sale, and, at that time, he discovered water damage which was caused by a leak in the home's plumbing system. Dr. Yu reported the water damage to Defendant, and Defendant investigated and paid Plaintiffs' claim (hereinafter sometimes referred to as the "first water damage claim") for that February 2013 water damage. (see paragraphs 8 - 11)
6. Approximately nine months later (on November 4, 2013), Defendant issued its annual renewal of Plaintiffs' Homeowners Policy covering the period from December 8, 2013 to December 8, 2014 (see paragraph 12). The renewed policy continued to insure Plaintiffs' "residence premises" (as defined in said Homeowners Policy) including Plaintiffs' home ("dwelling") and garage ("other

structure”) from loss due to “Special Perils”⁷ (Relevant portions of said Homeowners Policy are attached hereto as Exhibit 2 and also as Exhibit E to Defendant’s Application for Leave to Appeal. The “Special Perils” language is at page 1 of GH60011012 at Exhibit E of Defendant’s Application for Leave to Appeal).

7. Thereafter, on December 25, 2013, water again escaped from the plumbing system in Plaintiffs’ West Lake home and damaged it. Plaintiffs were in East Lansing at the time, and, when a neighbor notified Dr. Yu (by phone) that icicles were forming on the outside of the home, Dr. Yu immediately drove to Portage and observed that water had caused extensive damage to the home. Dr. Yu immediately notified Defendant of the damage (paragraph 13).
8. After Dr. Yu had reported this second water damage claim to Defendant on December 25, 2013, Plaintiffs received a letter, from Defendant, which was dated December 16, 2013 (see paragraph 14 and see also Exhibit E to the Yu Affidavit) and which stated in part:

“We regret that we are unable to continue your homeowners insurance. The reason is because the dwelling has been unoccupied for more than 60 days or is vacant.

The present coverage will expire at 12:01 a.m. on January 18, 2014.”

9. Thereafter, Plaintiffs received a \$791.81 check, from Defendant, dated January 1, 2014 (copy at Exhibit F to the Yu Affidavit) for a prorated (87.6%) portion of the

⁷ On page 20 of the deposition transcript of Farm Bureau Agent Dan Gregard (see Exhibit 3) is the following question and answer: Q. And what’s the number of perils covered under the special perils policy? A. Well, it’s is not - - that’s the - - reason you chose special perils, special perils does not name the perils that are covered. Instead it only names the perils that are not covered and everything else is.

\$892 premium which Plaintiffs had paid for the renewal of said “Homeowners Policy” for the annual period from December 8, 2013 to December 8, 2014. It is Plaintiffs’ understanding that the \$100.19 amount retained by Defendant was its charge for insuring their West Lake home for the period from December 8, 2013 to January 18, 2014 (see paragraphs 15 and 16).

10. While Defendant was investigating Plaintiffs’ second water damage claim, Plaintiffs’ attorney received a letter from Defendant, dated February 3, 2014 (copy at Exhibit G to the Yu Affidavit) requesting a “Sworn Statement and Proof of Amount of Loss.” And, on April 3, 2014 Plaintiffs’ attorney delivered to Defendant, via facsimile, a \$80,636.67 “Sworn Statement and Proof of Amount of Loss,” (see paragraphs 17 and 18 and Exhibit H to the Yu Affidavit).
11. Thereafter, by certified letter dated June 20, 2014, (copy at Exhibit I to the Yu Affidavit), Defendant notified Plaintiffs that it was denying Plaintiffs second water damage claim (paragraph 19).

As a result of the denial of their claim, Plaintiffs filed a complaint against Defendant, on December 18, 2014, in the Ingham County Circuit Court. In Count I of their two-count complaint, Plaintiffs requested a declaratory judgment to determine liability under the terms of the subject Homeowners Policy; and in Count II, Plaintiffs alleged that Defendant had breached its insurance contract with Plaintiffs.

**B. DEFENDANT’S STATED REASONS, FOR DENIAL OF PLAINTIFFS’
DECEMBER 2013 CLAIM AND RELEVANT DEPOSITION TESTIMONY OF
DEFENDANT’S AGENTS IN THAT REGARD**

Defendant’s June 20, 2014 letter (see Exhibit I to the Yu Affidavit at Exhibit 1) notified Plaintiffs that Defendant was denying Plaintiffs’ second water damage claim because:

“1. Your claim for the loss of the dwelling or any loss of use of the dwelling is barred because you did not reside in the dwelling at the time of the loss and therefore it was not a “residence premises” as required and defined by the policy of insurance.

2. Your claims are also barred due to the increase in hazard at the subject property by means within your knowledge including, but not limited to, the vacancy of the subject home beyond a period of 60 consecutive days and the increases in hazards associated with that condition.

3. Your claims are also barred due to the increase in hazard at the subject property by means within your knowledge including, but not limited to, the fact that the subject home was unoccupied beyond a period of 6 consecutive months and the increases in hazards associated with that condition.”

These “reasons” for denial raise the question of how others who own both a primary dwelling (home) and a second (or “seasonal”) dwelling (home) insure their second or “seasonal” home against water damage of the kind that occurred in this case. This issue was discussed by Defendant’s insurance agent, Dan Gregart, who serviced Defendant’s Homeowners Insurance Policy with the Plaintiffs. Plaintiffs’ counsel took Mr. Gregart’s deposition on May 28, 2015. On pages 60 - 63 of the transcript of that deposition (see Exhibit 3) are a series of questions and answers by Mr. Gregart concerning homeowners insurance policies through which Defendant insures so called “seasonal” homes as contrasted with “primary” homes. That exchange is:

11 Q I'll rephrase it. Let's assume that Song
 12 Yu called you on February 21st, 2013, and said I
 13 have moved to Lansing. I'm living in Lansing but
 14 I am still visiting my home on West Lake. Is
 15 there anything that I need to do to update my
 16 insurance policy coverage; what would you have
 17 told him?
 18 MR. WILLISON: Objection to the
 19 form.
 20 THE WITNESS: It really depends. I
 21 would have had to have the conversation. I would
 22 have asked him what the usage of the house would
 23 have been.
 24 BY MR. NOUD:

25 Q And let's assume that he told you that he
61
1 was spending his -- some of his off work time down
2 at the home?
3 A It would have been I would have informed
4 him about the -- I believe we had to make a change
5 to change to a seasonal home, which is a simple
6 change from an owner occupied to a seasonal -- I'm
7 sorry, primary to seasonal home.
8 Q And how would you have physically
9 accomplished that change to a, quote, seasonal,
10 end quote, home?
11 A Through a change form, Farm Bureau
12 company change form.

...
62
2 Q Well, what's your understanding of the
3 meaning of the word seasonal?
4 It would be a secondary home that is not
5 the primary home -- the primary owner occupied
6 home of the insured.
7 Q And do you write many -- or do you sell
8 many homeowners insurance policies for seasonal
9 homes?
10 A Yes.
11 Q Approximately how many?
12 A 100.
13 Q Back to the fact that you testified to
14 earlier about just wanting to follow standard
15 procedures, those weren't your exact words,
16 they're as close as I can come, and that was the
17 reason why you asked Monica Dixon⁸ to notify Ms.
18 Creighton⁹ to cancel this policy.
19 A Um-hum.
20 Q Since you had written 100 policies for
21 other insured customers on seasonal homes, why
22 didn't you call up Song and ask him whether or not
23 he wanted a seasonal policy on his home rather
24 than just canceling?
25 A Well, because the home appeared vacant,
63
1 in which case it would be ineligible for a

⁸ Monica Dixon is Mr. Gregart's office manager.

⁹ Ms. Creighton is an underwriter for Defendant.

2 seasonal home policy.
3 Q So you made the assumption that the home
4 was vacant and that's why you ordered the policy
5 to be canceled rather than calling up Song Yu and
6 asking him whether or not it was vacant; is that
7 correct?
8 MR. WILLISON : Objection to the form
9 of the question, the use of assumption.
10 THE WITNESS : I used what
11 information I had at my disposal --
12 BY MR. NOUD:
13 Q Well, how did --
14 A -- and informed the underwriter of what I
15 found.
16 Q Well, it wouldn't have been very hard to
17 call Song on the phone and confirm whether or not
18 your observation was correct, would it?
19 A I wanted to go through official channels.
20 Q But why didn't you want to call Song?
21 A Because I wanted to go through official
22 channels.

On pages 53 - 56, Plaintiffs' counsel questioned Mr. Gregart concerning why he decided to cancel Plaintiffs' insurance policy rather than making a "simple change" (Mr. Gregart's term) to Plaintiffs' homeowners policy to designate Plaintiffs' lake home as a "seasonal" home rather than a "primary home." That exchange is:

18 Q Did you go over and view the home on or
19 about 12-11 of '13, the home on Forest Drive, I
20 should say?
21 A Yes, I did.
22 Q And did you take a picture of it?
23 A I took a picture of the for sale sign.
24 Q And did you direct Monica to forward the
25 picture and a request cancellation to KCreighton?
54
1 A Yes.
2 Q And who is KCreighton?
3 A My homeowners underwriter.
...
10 Q If you wanted to cancel one of your
11 customer's insurance policies would you contact

12 KCreighton?
 13 MR. WILLISON: Objection,
 14 foundation.

18 Q Well, why did you tell Monica to contact
 19 KCreighton under the circumstances of this case?

20 A Because I observed the home to be vacant.

21 Q And why was KCreighton the person to call
 22 if the home was vacant?

23 A She is my homeowners underwriter assigned
 24 to my region of the state.

25 Q Well, when you saw the for sale sign and

55

1 took a picture of it, did you think about calling
 2 up Song Yu and asking him about coverage which
 3 Farm Bureau or you might have available for a lake
 4 home which was being put on the market?

5 A No.

6 Q Why not?

7 A That option was a non Farm Bureau product,
 8 so my priority at that time was making sure that
 9 if the home was, in fact, vacant that we got it
 10 off the books.

11 Q Did you go inside the home?

12 A I looked through windows.

13 Q And what did you see?

14 A An empty house.

15 Q Okay.

16 A didn't look -- an empty house.

17 Q Yeah. Did it ever go through your mind
 18 that maybe this was a home since it was on the
 19 lake that Song Yu might be using periodically?

20 A That wasn't something I considered.

21 Q Why not?

22 A It had the appearance of being vacant,
 23 and so I wanted to make sure that we went through
 24 the channels to proceed with cancellation because
 25 it increased risk.

56

1 Q You didn't feel any sense of
 2 responsibility to Song Yu to call him up and talk
 3 to him about what you were going to do?

4 A No.

5 Q Why not?

6 A I wanted to go through our official

7 channels.
 8 Q And what did you understand would happen
 9 if you went through official channels?
 10 A A letter of cancellation would be sent to
 11 the insured notifying them.

Though Mr. Gregart testified (above) that Plaintiffs' home was "vacant" on December 11, 2013, Plaintiffs presented evidence to the trial court that it was not vacant as "vacant"¹⁰ is defined in the subject homeowners policy. That evidence included paragraph 5 of Song Yu's November 11, 2015 Affidavit (at Exhibit 1) that from the time Plaintiffs moved to the Lansing area in 2010:

1. The lake home and garage had "furnishings" in them;
2. The lake home and garage had the "amenities minimally necessary for human habitation" in them; and
3. The lake home and garage were serviced by "utilities."

With respect to Defendant's contention that the residence premises was vacant, the homeowners insurance policy defines "residence premises" as:

"The one family dwelling, other structures and grounds." (emphasis added)

The policy defines "vacant" as:

"The absence of furnishings, utilities and the amenities minimally necessary for human habitation."

With respect to these definitions, Defendant's counsel's Examination Under Oath (EUO) of Plaintiff Song Yu on May 14 of 2014, which is at Exhibit D to Defendant's Application, elicited important information that relates to the definitions. At pages 29 - 33 Song Yu testified that when he and Mrs. Yu moved to a 600 square foot apartment in Okemos in 2010, they left

¹⁰ Vacant is defined in the subject Homeowners Policy as: " 'Vacant' and 'vacancy' mean the absence of furnishings, utilities, and the amenities minimally necessary for human habitation . . ."

most of their furniture in their West Lake home. And that when they prepared their home for sale in 2013, they moved most of the furniture from their West Lake home to the garage serving that home because their realtor believed that the home would show better if the old furniture was removed from the newly remodeled home. At page 23 and at pages 60 - 62 of the transcript of the EUO (at Exhibit D to Defendant's Application) Song Yu discusses the remodeling of the lake home between February 7, 2013 (the day that Song Yu and realtor Lakey discovered the February water damage) and the date (during the summer of 2013) that realtor Lakey listed the lake home. At lines 21 and 22 on page 61 of Song Yu's EUO is the following statement:

"And it took me about 3 or 4 months to fix everything, and then so we listed it in June or July."

At lines 6 through 22 on page 23 of the EUO, Song Yu explains, that the remodeling included a new hardwood floor throughout the first (main) floor; new carpeting in all the rooms on the upper (second) floor; and repainting of the entire interior of the home.

On May 21, 2015 Plaintiffs' counsel took the deposition of Linda Ricks, the Farm Bureau adjuster who investigated both Plaintiffs' first (February 7, 2013) water damage claim and Plaintiffs' second (December 25, 2013) water damage claim. With respect to Ms. Ricks' investigation of the February 2013 water damage claim, the following exchange took place (see pages 14 - 19 of the transcript of Ms. Ricks' deposition at Exhibit 4):

13	Q	And when you called and spoke with Song Yu on
14		February 8th of 2013, what discussion did you have with
15		him?
16	A	I don't remember the actual conversation but from
17		my notes, reading the summary of the conversation, it
18		was asking him what had happened, what they had found,
19		and that he said they had already called Servepro and so
20		they were in doing some demoing to dry out the
21		structure. And that he told me that he was in Lansing,
22		that they were moving and he was going back and forth on

23 the weekends and they were doing some repairs to prepare
24 it to go on the market.

...

10 Q Now, is it your testimony that Song Yu told you
11 that he was living in Lansing at the time?

12 A That he was -- he was in Lansing at the time that
13 I was talking to him and he just said that he had moved.
14 I wasn't certain that it was Lansing that he moved to.

15 Q If he was living in Lansing in February of 2013,
16 would that fact have had any bearing on whether this
17 water damage to the home at 1724 Forest in Portage was
18 covered by his homeowner's insurance policy with Farm
19 Bureau?

20 A Well, he told --

21 MR. WILLISON: For the February loss?

22 MR. NOUD: Yes.

23 THE WITNESS: He told me that he was moving
24 to Lansing, that's my notes.

25 BY MR. NOUD:

16

1 Q Are you sure of that?

2 A In referencing my notes, which I can't remember
3 the exact conversation.

...

17

1 Q Are you sure that he told you that he was moving
2 to Lansing?

3 A Based on the notes that inputted in the file
4 and my history of working claims and putting notes --
5 making notes and referencing, yes.

6 Q Would it surprise you to know that he had lived
7 in Lansing since July of 2010?

8 A Yes.

9 Q Did you ask Song Yu whether he was living in the
10 home at 1724 Forest when you talked to him on February
11 8th of 2013?

12 A I don't -- didn't note that --

13 MR. WILLISON: February 8th is up here.

14 THE WITNESS: I didn't note that I asked him
15 that, no.

16 BY MR. NOUD :

17 Q Well, why didn't you ask him?

18 A . It didn't seem to be important at that point in
19 time.

20 Q Well, if he wasn't living in the home at that

21 time wouldn't that be important?
 22 A Again, when he told me he was moving and then
 23 when I did make the inspection it was evident that that
 24 was the case, there were boxes of goods boxed up and
 25 that I thought it was in the process of moving. There

18

1 were doors laying on the living room floor, kitchen
 2 cabinets being painted, and he said that he had been
 3 doing some repairs to get ready to put it on the market.
 4 That seemed logical to me.

5 Q But you didn't ask him whether he was living in
 6 the home at that time; is that correct?

7 MR. WILLISON: Objection to the form of the
 8 question. She's already testified she doesn't recall.
 9 Now you're trying to put words in her mouth.

10 MR. NOUD: No, I want to know whether or not
 11 she recalls asking him whether he was living in the
 12 home.

13 THE WITNESS: No.

14 BY MR. NOUD:

15 Q You don't recall that?

16 A I don't recall that.

17 Q And my question is wouldn't it be important to
 18 inquire?

19 A In hindsight now, yes. At the time what he told
 20 me appeared to be the case when I looked -- when I was
 21 at the house.

22 Q Well, wait a minute. Does it seem logical to you
 23 that if he had been living in Lansing for three years
 24 that he would have told you he was moving?¹¹

...

19

13 THE WITNESS: No.

On pages 37 - 39 of her deposition transcript, Ms. Ricks answered questions concerning the Farm Bureau Insurance Activity Log Report concerning Plaintiffs' February 7, 2013 claim (a copy of that Log Report is at Exhibit C to the Yu Affidavit at Exhibit 1). The exchange is:

4 Q And down near the bottom of that February 21st

¹¹ Ironically, in February of 2013, Plaintiffs were in the process of buying a home in East Lansing. They closed the purchase of the home on March 29, 2013 (see Exhibit B to Song Yu's Affidavit) and moved from an apartment in Okemos to their new home in East Lansing.

5 entry next to, quote, underwriting/general comments you
 6 made an entry and what was the entry you made?
 7 A Send U/W, standing for underwriting, report,
 8 insured getting ready to put house on the market.
 9 Q What is an under- -- what is the underwriting
 10 report referred to here?
 11 A It's a notice sent -- to be sent to underwriting
 12 putting -- the same as contacting the agent to let them
 13 know that the house may be sitting empty.
 14 Q I want a copy of that underwriting report and I
 15 don't have it to my knowledge.
 16 A There was none.
 17 Q Pardon?
 18 A There was none. I forgot to file it.
 19 Q If you had filed an underwriting report what
 20 would have been the standard action that would have been
 21 taken in response to that?

...

38

2 If
 3 you had prepared and sent an underwriting report, what
 4 would have been in that report?
 5 A The same statement that I said here, that the
 6 insured is getting ready to put house on the market.
 7 Q And to whom would you have sent that underwriting
 8 report?
 9 A The underwriting department.
 10 Q And what is the under- -- what is your
 11 understanding of what the underwriting department is?
 12 A People that review policies and identify risks as
 13 far as potential bad risks or risks that we need to be
 14 concerned about.

...

25 Q And do you have an understanding of what the

39

1 underwriting department would have done with your
 2 report --
 3 A Some --
 4 Q -- if you had made it?
 5 A Someone would have followed up on it, again,
 6 talking to the agent and to watch the house to see if it
 7 was -- appeared to be empty or if there was anybody
 8 living in it.

On pages 44 - 46 of the Ricks deposition transcript, the following exchange took place with respect to the issue of whether Plaintiffs' lake home was "vacant" in February of 2013:

44

- 1 Q And under what circumstances would Farm Bureau,
- 2 to your understanding, not have had responsibility to
- 3 repair the water damage?
- 4 A If the house had been vacant for over 60 days.
- 5 Q And did you do anything to investigate whether or
- 6 not the house had been vacant for more than 60 days?
- 7 A No, I took the insured that he was in the process
- 8 of moving, this is my interpretation of what he had told
- 9 me, and that they were going back and forth and
- 10 preparing it for -- to go on the market and that they
- 11 had been there. I took it -- interpreted it that way,
- 12 that it was within the 60 days.
- 13 Q And what, again, may -- well, no, strike that.
- 14 Do you now believe you misinterpreted what you learned
- 15 from Song Yu?
- 16 A Yes.
- 17 MR. WILLISON: Misinterpreted or misled?
- 18 Are you asking her whether she thinks it was --
- 19 BY MR. NOUD:
- 20 Q Do you now think you were misled by Song Yu?
- 21 A Yes.
- 22 Q Why do you think you were misled by Song Yu?
- 23 A After finding out that they had been out of the
- 24 house for such a long period of time.
- 25 Q Did you ask him whether they'd been out of the

45

- 1 house for a long period of time?
- 2 A No, I did not.
- 3 Q Pardon?
- 4 A No, I did not.
- 5 Q Why didn't you?
- 6 A I didn't feel that it was necessary. I thought
- 7 what he told me was actually in the process of taking
- 8 place and it didn't cause me to ask any further
- 9 questions.
- 10 Q Did you ask him whether he was living in Lansing
- 11 at that time?
- 12 MR. WILLISON: Asked and answered. Go
- 13 ahead.
- 14 THE WITNESS: No, I didn't ask him where he

15 was living, he told me.
 16 BY MR. NOUD:
 17 Q Did you ask him how long he had been living in
 18 Lansing?
 19 MR. WILLISON: Again, we've established
 20 this, we've asked and answered It.
 21 MR. NOUD: I don't like the word misled and,
 22 therefore, we're going to find out what it was that was
 23 misleading.
 24 BY MR. NOUD:
 25 Q What was misleading about what Song Yu told you?
 46
 1 That he didn't -- he made me believe that
 2 they were going back and forth, that they were actively
 3 moving, not that it had been sitting there for three
 4 years empty.
 5 Q And what did he say exact -- what were his exact
 6 words that led you to believe that he was actively going
 7 back and forth?
 8 A He told me that they had been going back and
 9 forth and were preparing it for sale. The evidence that
 10 the doors were off of the cabinet and that they were
 11 being painted or they had been painted and were drying
 12 seemed that that was the case.
 13 Q So your inspection of the home led you to believe
 14 that they were in the process of moving rather than they
 15 had already moved; Is that your testimony?
 16 A Yes.

On pages 61 - 63, Ms. Ricks was asked questions concerning deposition Exhibit 7 (a copy of deposition Exhibit 7 is attached to this "Answer" at Exhibit 5). The subject of Exhibit 7 was whether Plaintiffs' home was "vacant" at the time of the December 2013 claim. That exchange is:

17 Q I show you Exhibit 7 and ask you whether or not
 18 you recognize that?
 19 A Yes.
 20 Q It's not long, it's an email from you to Monica
 21 Dixon dated Friday, December 27th, 2013, at 9:32 a.m.;
 22 is that right?
 23 A Yes.
 24 Q Please read it into the record.

25 A Thanks, Monica. I had a great Christmas, hope
62
1 you did as well. I was wondering if that might be an
2 issue, do you have the returned mail notices that you
3 could send me? That will help support my stand. I'm
4 sure he's going to say that they stay there on weekends.
5 Tony from Servepro told me it's the worst one he's ever
6 seen. Insured hasn't called me back yet. Thanks.
7 Happy New Year. Linda Ricks.
8 Q Why were you sure that Song Yu was going to say
9 that he hadn't stayed there -- or that he had stayed
10 there on weekends?
11 A I was thinking of worst case scenarios and what
12 might be said to offset us.
13 Q You weren't very objective at the time you made
14 that comment, were you?
15 MR. WILLISON : Objection, form of the
16 question. Go ahead.
17 THE WITNESS: I wasn't very objective? I
18 was concerned.
19 BY MR. NOUD:
20 Q And why would you be concerned about him saying
21 that he was staying there on weekends?
22 A I felt that there was a coverage issue here and I
23 was trying to cover my bases as far as what the
24 objections might be.
25 Q And trying to find no coverage, weren't you?
63
1 MR. WILLISON: Objection, don't answer that.

**C. THE PARTIES' SUMMARY DISPOSITION MOTIONS; THE TRIAL COURT'S
RULING; THE PLAINTIFFS' APPEAL; THE COURT OF APPEALS
DECISION; AND DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL**

On November 11, 2015, Plaintiffs filed a Summary Disposition Motion and supporting brief which included the above quotations from the depositions of Ms. Ricks and Mr. Gregart and the Affidavit of Plaintiff Song Yu (Exhibit 1). And, at the time of the hearing on the motion, Plaintiffs' counsel submitted two additional Exhibits to the court¹².

¹² Those exhibits are Exhibits 7 and 8 to this brief.

On December 30, 2015, Defendant filed Response and Counter-Motion for Summary Disposition which was supported by a certified copy of the subject homeowners policy, the examination(s) under oath (EUO) of both Plaintiffs, photos of Plaintiffs' lake home and the deposition of Linda Ricks.

At the conclusion of the January 6, 2016 hearing on the motions, the trial court orally denied Plaintiffs' Motion for Summary Disposition and granted Defendant's Motion for Summary Disposition Order. The stated factual grounds for the trial court's grant of Defendant's motion for summary disposition (see pages 52-59 of the transcript (T)¹³ of the January 6, 2016 hearing were):

1. "Plaintiffs do not meet the definition of reside in this - under this policy." (T53);
2. Plaintiffs' home had been vacant for 60 days at the time of the second water damage loss. (T56);
3. Plaintiffs' home was not "occupied under the definitions that were discussed" (T56); and
4. Plaintiffs' could not invoke the principle of equitable doctrine because (see T57 & 58):

"There is not evidence here that the Defendant intentionally abandoned¹⁴ the policy requirements of residency or the exclusions that would apply for vacancy or occupancy for longer than 60 days in the case of vacancy and six months in the case of occupancy." (*emphasis added*)

An order implementing the court's decision was entered on January 28, 2016.

¹³ A copy of pages 51 - 59 of the transcript is attached at Exhibit 6.

¹⁴ The equitable estoppel principle is much different than the waiver doctrine which the trial court seems to be referring to this quote.

On February 16, 2016, Plaintiffs filed a Claim of Appeal from the summary disposition Order. On April 11, 2017 the Court of Appeals issued an unpublished opinion reversing the trial court's ruling and ordering the trial court to enter judgment in favor of the Plaintiffs. On May 23, 2017, Defendant filed an Application for Leave to Appeal; and Plaintiffs are submitting this Answer to Defendant's Application for Leave to Appeal.

ARGUMENT

I. PLAINTIFFS' CLAIM OF EQUITABLE ESTOPPEL SHOULD PREVAIL OVER DEFENDANT'S DENIAL OF PLAINTIFFS' DECEMBER 2013 WATER DAMAGE CLAIM WHEN DEFENDANT HAD KNOWLEDGE OF OR ACCESS TO KNOWLEDGE OF FACTS AND CIRCUMSTANCES ON WHICH ITS DENIAL WAS BASED, IN FEBRUARY OF 2013, APPROXIMATELY NINE MONTHS BEFORE THE DEFENDANT RENEWED THE PLAINTIFFS' "SPECIAL PERILS" HOMEOWNERS INSURANCE POLICY IN NOVEMBER OF 2013.

A. STANDARD OF REVIEW

This Court's review of the Court of Appeals' decision regarding summary disposition pursuant to MCR 2.116(C)(10) is de novo. *Dressel v Ameribank*, 468 Mich 557, 561, 664 NW2d 151 (2003).

B. THE MICHIGAN LAW OF EQUITABLE ESTOPPEL

The Michigan law of equitable estoppel, with respect to insurance contracts, is discussed in the case of *Morales v Auto-Owners Ins Co*, 458 Mich. 288; 582 NW2d 776. The *Morales* case concerned a no-fault automobile insurance policy and the facts are not similar to the facts in the instant case. However, in *Morales*, the Supreme Court explained the application of the principle of equitable estoppel with regard to insurance contracts. In this regard, the Court stated (at pages 295 - 297 and 299):

The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract. (*emphasis added*)

...

Therefore, for equitable estoppel to apply, plaintiff must establish (1) that the defendant's acts or representations induced plaintiff to believe that the policy was in effect at the time of the accident, (2) that the plaintiff justifiably relied on this belief, and (3) that plaintiff was prejudiced as a result of his belief that the policy was still in effect. *Fleckenstein v. Citizens' Mut. Automobile Ins. Co.*, 326 Mich. 591, 599, 40 NW2d 733 (1950).

...

Indeed, there are many instances in Michigan insurance law where a particular provision of an insurance contract, which normally would operate to end an insurer's liability, is not rigidly enforced because of the principle of estoppel. See *Pastucha*, supra; *Staffan v. Cigarmakers' Int'l Union of America*, 204 Mich. 1, 169 NW 876 (1918); *Allstate Ins. Co. v. Snarski*, 174 Mich. App. 148, 435 NW2d 408 (1988)¹⁵.

Applying the principle of equitable estoppel to the facts of the instant case, Plaintiff Song

Yu's Affidavit attests:

1. That Defendant's act of paying Plaintiffs' February 7, 2013 claim for water damage to Plaintiffs' lake home induced Song Yu to believe that the subject homeowners policy insured against water damage loss to Plaintiffs' lake home which Plaintiffs had been using as their second (vacation) home since June of 2010;
2. That Song Yu justifiably believed that Plaintiffs' homeowners policy insured against water damage losses to Plaintiffs' lake home because of Defendant's act of paying Plaintiffs' claim for their first water damage loss; and
3. That Plaintiffs will be prejudiced if Defendant is allowed to deny insurance coverage for Plaintiffs' second water damage loss which took place under circumstances that were not materially different from the circumstances that existed at the time of the first water damage loss.

¹⁵ The full cite of the *Pastucha* case is *Pastucha v Roth*, 290 Mich. 1, 9, 287 NW 355 (1937), quoting *Wallace v Fraternal Mystic Circle*, 121 Mich. 263, 269, 80 NW 6 (1989).

C. THE INACCURATE FACTUAL ALLEGATIONS AND UNSUPPORTED LEGAL ARGUMENTS IN DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

Defendant argues that Plaintiffs' second (West Lake) home was vacant and unoccupied on December 25, 2013. This allegation is rebutted by Song Yu's testimony at pages 29 - 33 and 37 - 39 of the transcript of his May 14, 2014 examination under oath (EUO). It is also rebutted by additional photographs taken by Defendant on 12/27/13. Those photos were submitted into evidence by Plaintiffs at the January 6, 2016 hearing in the Circuit Court. Copies are attached as Exhibit 7, and they make more understandable Song Yu's EUO testimony about the nature of Plaintiffs' use of their lake home during the period from mid-2010 through 2013. In this regard, at pages 29-33 of the transcript of Song Yu's EUO (Exhibit D to Defendant's Application), the following questions were asked and answered:

16		the -- okay. Let's back up. You moved out in 2010; right?
17	A	Correct.
18	Q	And took all your stuff to Okemos ; right?
19	A	No.
20	Q	No? Okay. What did you leave?
21	A	Everything.
22	Q	What did you sit on in Okemos?
23	A	Remember, this is an apartment, a one-bedroom apartment . So
24		I took my couch -- no, I didn't take my couch, took our --
25		what we could, dishes, clothing. This was a 600-square-foot
29		
1		apartment, so most all of the furnishings and household
2		livings was still in Portage when we moved out to East
3		Lansing in 2010.
4	Q	So you took your clothes and your dishes and stuff?
5	A	Uh-huh (affirmative).
6	Q	Yes?
7	A	Yes.
8	Q	And then when you bought the house in East Lansing, you came
9		and got the rest of the stuff?
10	A	No .
11	Q	When did you come and get the rest of the stuff?
12	A	They're still there in the garage in Portage.
13	Q	Why?

14 A Most everything, furnishings that was bought, in East
 15 Lansing is new.
 16 Q Is that because the stuff that was in the house in Portage
 17 smells like old house?
 18 A My wife thought so.
 19 Q Okay . And so what was your intent with the stuff in the
 20 garage? Why did you move it from the house to the garage?
 21 A Because of the Listing for sale. The realtor said, "You
 22 either have to put brand new furnishings in there to make an
 23 appearance or get everything out."
 24 Q Okay.
 25 A So he made me move from house to the garage for the showing.

30

1 Q And that was to get rid of the -- to help get rid of the
 2 smell?
 3 A Part of that was that maybe, but also just appearance of the
 4 attractiveness of the home for showing. They either
 5 wanted - - he either wanted a full furnishing with nice
 6 looking things.
 7 Q Or empty?
 8 A or completely empty.
 9 Q All right. So you moved everything out into the garage
 10 when? Around the time of Exhibit 1, the listing agreement,
 11 or before that?
 12 A No; no. It was during; it was a process. Despite we moved
 13 a lot of the furnishings that we moved; the blankets, beds
 14 where we sleep, a blow-up bed, and clothings and dishes; all
 15 the other amenities were still there. Only thing that we
 16 moved was the dining tables, sofas.
 17 Q Why did you leave your blow-up mattress in the house? Why
 18 didn't you put that in the garage?
 19 A To come there to spend time.
 20 Q Well, you have access to the garage; right? I mean, you
 21 could have gotten it out of the garage and used it then;
 22 right?
 23 A So that means I had to move every time I went over there?
 24 Q No. I'm asking you if the goal was to have the house empty;
 25 why did you leave the air mattress in the house?

31

1 A I just did it.
 2 Q Okay.
 3 A Because that wasn't getting in the way of the showing,
 4 because they were in the closet.
 5 Q Okay. So when the pipe burst due to freezing, was all the
 6 stuff still in the house , or was it in the garage or what?

7 A Everything that I mentioned being in there; clothing, the
8 bed, the things that we mentioned; are still there -- were
9 still there.
10 Q I thought you took your clothing to East Lansing?
11 A We have clothing to the East Lansing, part of it, when we
12 had to move in May, but we did not move everything.
13 Q Why would you have any clothing in Portage?
14 A Because that was my home.
15 Q How often would you go there?
16 A Quite often in the summer months.
17 Q I don 't know what that means.
18 A Quite often meaning that every time I had a chance to go
19 from my work.
20 Q I don't know what that means either, though.
21 A Well, the numbers-wise? Is that the number of the wise that
22 you wanted?
23 Q Yeah . I mean, how --
24 A In the summertime I'd probably be there at least once a
25 month.

32

1 Q And that was true in 2013?
2 A '13, yes.
3 Q Okay. And outside of summer?
4 A Only for maintenance of the home, so I would only maybe be
5 there twice a season, just to clean up the leaves.
6 Q So your wife 's estimate was about six times a year. It
7 sounds like you kind of agree with that?
8 A My estimation would be slightly more than that. I would say more
of ten
9 times a year.

Moving on, near the top of page 22 of its Application, Defendant states: “While plaintiffs had moved out in 2010, this is not what they told Farm Bureau’s adjuster in February of 2013. They said they were moving.”

That’s the quote, but the fact is that adjuster Linda Ricks testified (see page 15 of Exhibit

4)

10 Q Now, is it your testimony that Song Yu told you
11 that he was living in Lansing at the time?
12 A That he was - - he was in Lansing at the time that
13 I was talking to him and he just said that he had moved.

14 I wasn't certain that it was Lansing that he moved to.

In addition, Ms. Ricks recorded in a Farm Bureau Insurance Activity Log Report (see Exhibit 8) on February 21, 2013:

"Insured is moving to Lansing, this house is going on the market."

Ms. Ricks made this entry approximately 9 months before Defendant renewed Plaintiffs' homeowners insurance policy (for another year) by renewal notice dated November 4, 2013 (see Exhibit D to Song Yu's Affidavit at Exhibit 1).

It is also important to consider the fact that there is no provision in the subject homeowners policy which requires Plaintiffs to notify Defendant of their move (as there was in several insurance policies at issue in cases cited by Defendant).

At page 23 of its Application for Leave to Appeal Defendant states as follows:

The dissenting Judge [Judge Servitto] noted that plaintiffs had possession of their policy (containing the increase in hazard provision), and the endorsement to the policy required plaintiffs to notify Farm Bureau in the sworn proof of loss of "any changes of title or occupancy of the property during the term of the policy." Thus, the dissenting Judge identified the reason why any claimed reliance could not be reasonable. *Cooper*, 481 Mich at 415.

It seems disingenuous for Defendant to make the argument quoted above when Defendant did not "request" that Plaintiff submit a "sworn proof of loss" in the course of Defendant's investigation and payment of the Plaintiffs' February 2013 water damage claim. Surely Defendant and its counsel are aware that no such request was made.

Moving on, Defendant cites the cases of *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155; 534 NW2d 502 (1995)¹⁶ and *McGrath v Allstate Ins Co*, 290 Mich App 434, 441; 802 NW2d 619, 623 (2010) at pages 25, 27 and 28 of their application. The facts of the *Heniser* case distinguish it from the facts in this case. In *Heniser*, the Plaintiff and his wife had purchased a vacation home in Honor, Michigan and had lived in the home intermittently through the years until they divorced. *Heniser* retained possession of the home after the divorce, but, in November of 1988, he sold the home on land contract without informing Frankenmuth of the sale. The Supreme Court stated:

“... the conditions section of the policy requires the insured to notify the insurer of any ‘changes in title or occupancy of the property during the term of the policy’ before recovering for any loss . . .”

By contrast, (as stated earlier) there is no similar requirement in the homeowners insurance contract between Plaintiffs and Defendant.

At the time of the November 1988 sale, the *Heniser* home was insured by a homeowners policy which had been renewed in September of 1988 for an additional one year period. In its opinion the Supreme Court also stated (at pages 162 and 163):

“While the definition of ‘reside’ may be ambiguous in other contexts, there is no ambiguity in this case . . . In some contexts, the legal term means something more than actual physical presence; it includes the intent to live at the location at some time in the future, a meaning similar to the legal concept of domicile . . . In other contexts, the term requires actual physical presence.

...

¹⁶ In addition Defendant also made the following incorrect statement at page 27 of its application:

“The policy in *Heniser*, like the policy in the instant case, required the insured to notify the insurer of any changes in title or occupancy of the property before recovering for any loss.”⁵³

⁵³ *Heniser* at 162. Although appellee asserted in the Court of Appeals that Farm Bureau’s policy did not contain a notice requirement, Judge Servitto correctly noted that the endorsement in the policy that plaintiffs had the duty to set forth in the proof of loss any changes in title or occupancy during the policy term, thus requiring notification before recovering for any loss as in *Heniser*. See dissenting opinion at 3; Policy, form GH66321012, p1 of 2.”

Finally any ambiguity created by the fact that the law ascribes multiple meanings to the term ‘reside’ is irrelevant because Mr. Heniser fails under either standard.^{10,}

Footnote 10 in the *Heniser* opinion states:

“Whether Heniser actually had to live at the insured premises on a full time basis, or whether intermittent occupancy was sufficient, is not in dispute. In light of the fact that this policy was issued with the knowledge that Heniser used the property as a vacation home on an irregular and sporadic basis, it is likely that Frankenmuth Mutual contemplated noncontinuous occupancy.”

By contrast, in this case, the question of whether intermittent occupancy is sufficient is very much in dispute.

Now, applying the above quoted statements in *Heniser*, to this case, the relevant facts include:

1. First, that in February of 2013, Farm Bureau adjuster Linda Ricks concluded (and recorded) that the Plaintiffs were moving to Lansing and were putting their lake home on the market, but neglected to make an underwriting report concerning her conclusion; and
2. Second, that approximately 9 months later (on November 4, 2013) Defendant renewed Plaintiffs’ homeowners policy for an additional year from 12/8/13 to 12/8/14.

Why, during the 9 months between February of 2013 and November 4, 2013, didn’t Defendant notify Plaintiffs that it was cancelling the subject policy, because of Plaintiffs’ move of their primary residence from their lake home, rather than renewing the policy? Defendant’s action (in this regard) equitably estops it from denying insurance coverage for Plaintiffs’ December 2013 water damage loss:

1. First, because Defendant's act of paying Plaintiffs' claim for their February 7, 2013 water damage loss led Plaintiffs to reasonably believe that their homeowners policy insured against water damage to the lake home which they had been using as their second (vacation) home since June of 2010;
2. Second, Plaintiffs justifiably believed that their homeowners policy insured against water damage loss to their lake home because of Defendant's act of paying Plaintiffs' claim for their first water damage loss; and
3. Third, because Plaintiffs will be prejudiced if Defendant is allowed to deny coverage for Plaintiffs' second water damage loss which took place under circumstances that were not materially different from the circumstances that existed at the time of Plaintiffs' first water damage loss.

With respect to the *McGrath* case, in which the Court of Appeals held that the phrase "where you reside," in the insurance policy definition of covered "dwelling," was a "statement of coverage" that required that the insured live in the premises at the time of the loss. There are several material facts which distinguish the *McGrath* case from this case. First, there was no claim of equitable estoppel in the *McGrath* case. We will never know how the Court of Appeals would have ruled:

1. If Allstate had paid a prior claim for a water damage loss while Mrs. McGrath was physically living in Farmington Hills because her health no longer permitted her to live in her Gaylord home;
2. And, if after paying the first water damage claim, Allstate had renewed Mrs. McGrath's homeowners policy;

3. And, if after renewing Ms. McGrath's homeowners policy, Allstate had later denied a second claim for a water damage loss under circumstances that were not materially different than the circumstances existing at the time of the first water damage loss.

Secondly, it is important to note that the *McGrath* Court stated (at pages 443 and 444):

"As in *Heniser*, there is no ambiguity in the Allstate policy issued to Ms. McGrath. Accordingly it was error for the trial court to ascribe a technical meaning to the term "reside" when the common understanding of the term required that Ms. McGrath live at the Gaylord address at the time of the loss. It is undisputed that Ms. McGrath did not physically live at the Gaylord address when the pipes froze and burst or for two years before the loss and therefore, she did not satisfy the requirement that she 'reside' in the house when the loss occurred."²

Footnote 2 in the *McGrath* opinion states:

"We also observe that Ms. McGrath arguably did not live at the Gaylord residence when the loss occurred or when the policy came into effect. Justice Levin argued in his dissent in *Heniser* that if Mr. Heniser had resided at the property when he received his homeowners insurance renewal certificate he may have reasonably concluded that he was covered for the policy year . . . Here, in response to Allstate's motion for summary disposition Plaintiff pointed out that Allstate issued a renewal policy after Ms. McGrath had moved out of the Gaylord house in 2003, and plaintiff affirmatively argued that this was a different policy period, during which a different insurance contract was in force. Were we to conclude that the phrase "where you reside" in the policy does not require that an insured be physically present in the dwelling throughout the policy period, plaintiff's position would suggest that Ms. McGrath had to at least reside in the Gaylord property when she received the renewal certificate, or on the date it became effective. However we decline to address this issue because our holding resolves the matter and because despite Plaintiff's assertions the parties did not attach evidence of a policy renewal to their briefs below and this issue was not argued before or decided by the court."

By contrast in this case, evidence of Defendant's 11/4/13 renewal of the subject homeowners policy for another year, is at Exhibit D to Song Yu's affidavit in support of Plaintiff's motion for summary disposition; and it is clear that Plaintiffs have raised the issue that Defendant should be precluded from denying coverage, on the ground that Plaintiffs were not

residing in their lake home, because Defendant renewed the Plaintiffs' homeowners insurance policy 9 months after Defendant's employee, Linda Ricks, concluded (to use her words) that: "Insured is moving to Lansing, this house is going on the market."

In addition, in the definitions section of the instant homeowners policy, Defendant draws a distinction between the physical presence and the legal presence of its insureds. The policy definition of "occupied" states:

"Occupied means being lived in with regular and continuous legal presence of human inhabitants . . ." (*emphasis added*)

Because of Defendant's use of the phrase "legal presence," it seems clear that occupied does not mean "being lived in with regular and continuous physical presence of human inhabitants." And (as cited in Plaintiffs' Complaint and in Plaintiffs' Trial Court Brief), the online "Merriam Webster's Dictionary" definition of occupied includes the following definition:

". . . to reside in as an owner or tenant."

In light of these facts, Plaintiffs respectfully contend that the word "reside" in the definition of "residence premises" (in the homeowners policy at issue in this case) does not mean the regular and continuous physical presence of human inhabitants.

It is also important to note that in none of the cases cited by Defendant, is there any discussion of the meaning of the word reside in an insurance policy in which "occupied" is defined as being lived in with regular and continuous legal presence of human inhabitants. Therefore:

1. Because there is no definition of reside in the policy at issue in this case; and
2. Because "occupied" is defined (in the policy) as:
 "being lived in with regular and continuous legal presence of human inhabitants . . ."; (*emphasis added*) and

3. Because the above quoted dictionary definition of occupied includes “to reside in as an owner or tenant.”

Plaintiffs respectfully contend that both the *Heniser* case and the *McGrath* case should be distinguished by this Court.

Moving on, with respect to Defendant’s contention that Plaintiffs’ lake house was “vacant” for more than 60 days and/or unoccupied for over 6 months, in its Court of Appeals brief, Defendant cited the case of *Vushaj v Farm Bureau General Ins. Co. of Michigan*, 773 NW2d 758, 284 Mich. App. 513, (2009), which states in part:

“Because terms must be interpreted in the context of the contract in which they appear, we conclude that the terms “vacant” and “unoccupied” mean not routinely characterized by the presence of human beings.”

This analysis is not relevant in this case because the instant insurance contract defines “vacant” and “occupied.” “Vacant” is defined as:

“... the absence of furnishings, utilities, and the amenities minimally necessary for human habitation ...”

Occupied is defined as:

“... being lived in with regular and continuous legal presence of human inhabitants ...”

And with respect to these definitions, the affidavit of Song Yu and his testimony at pages 29 through 33 and pages 37 through 39 of his EUO establish:

1. That, at the time of Plaintiffs’ second water damage loss, there were furnishings, utilities and the amenities minimally necessary for human habitation in Plaintiffs’ lake home and garage; and

2. That during the 6 months prior to the December 2013 water damage loss, Plaintiffs were using their lake home as their second (vacation) home.

Notably, the *Vushaj* Court of Appeals also stated:

“Plaintiff also contends that there was a genuine issue of material fact regarding whether defendant was aware that the home was unoccupied at the time that it renewed the insurance policy. This issue was not raised until plaintiff filed his motion for reconsideration. Where an issue is first presented in a motion for reconsideration, it is not properly preserved. See *Pro-Staffers, Inc. v. Premier Mfg. Support Services, Inc.*, 252 Mich. App. 318, 328-329, 651 NW 2d 811 (2002). This Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available. *Brown v Loveman*, 260 Mich. App. 576, 599, 680 NW 2d 432 (2004). In the present case, there are no facts on the record regarding defendant’s knowledge of the home’s occupancy at the time of the policy renewal. Therefore, it would be improper to address this claim on appeal.” (*emphasis added*)

By contrast, in this case there are “facts on the record” about Linda Ricks’ written conclusion on February 21, 2013 (see Exhibit 8), that Plaintiffs were moving to Lansing and putting their home on the market.

And, in fact, in this case, the actions of Defendant:

1. In paying Plaintiffs’ February 2013 water damage loss claim; and
2. In renewing Plaintiffs’ homeowners policy nine months later;

justified Plaintiffs’ belief that their homeowners policy insured against the water damage loss to their vacation home which occurred in December of 2013.

II. THE AMBIGUOUS OR UNAMBIGUOUS LANGUAGE OF THE PARTIES’ “SPECIAL PERILS” HOMEOWNERS INSURANCE CONTRACT PROVIDED COVERAGE FOR THE PLAINTIFFS’ SECOND HOME ON WEST LAKE, ON DECEMBER 25, 2013 WHEN PLAINTIFFS WERE OCCUPYING THEIR LAKE HOME (AS OCCUPIED IS DEFINED UNDER THE PARTIES’ INSURANCE POLICY) AND WHEN PLAINTIFFS’ LAKE HOME WAS NOT VACANT (AS VACANT IS DEFINED UNDER THE PARTIES’ INSURANCE POLICY).

A. STANDARD OF REVIEW

This Court's review of questions involving contract interpretation is de novo. *Rory v Continental Ins. Co.*, 473 Mich. 457,464; 703 NW2d 23 (2005).

B. ON DECEMBER 25, 2013 PLAINTIFFS WERE OCCUPYING THEIR LAKE HOME (AS OCCUPIED IS DEFINED UNDER THE PARTIES' INSURANCE POLICY) AND PLAINTIFFS' LAKE HOME WAS NOT VACANT (AS VACANT IS DEFINED UNDER THE PARTIES' INSURANCE POLICY)

For the reasons stated above in this answer, on December 25, 2013:

1. Plaintiffs were living in their lake home "with regular and continuous legal presence"; and
2. "Furnishings, utilities, and the amenities minimally necessary for human habitation" were in Plaintiffs' lake home and in the garage which served the lake home.

C. DISCUSSION OF THE DIFFERENCE BETWEEN THE DOCTRINES OF WAIVER AND OF EQUITABLE ESTOPPEL AND THEIR APPLICATION TO THE FACTS OF THIS CASE

In the 2008 case of *McDonald v Farm Bureau Ins Co*, 480 Mich. 191, 204; 747 NW2d 811 (2008), the Supreme Court contrasted the Michigan doctrines of waiver and equitable estoppel as follows:

" 'A waiver is a voluntary relinquishment of a known right.' *Dahrooge v. Rochester-German Ins. Co.*, 177 Mich. 442, 451-452, 143 N.W. 608 (1913). Neither party disputes that waiver is inapplicable here because defendant did not voluntarily relinquish its right to enforce the one-year time limit. For equitable estoppel to apply, plaintiff must establish that (1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced. See *Grosse Pointe Park v. Michigan Muni. Liability & Prop. Pool*, 473 Mich. 188, 204, 224, 702 N.W.2d 106 (2005) (opinions by Cavanagh, J., and 820*820 Young, J.); *Dahrooge*, supra at 452, 143 N.W. 608."

In this case, Plaintiffs have not relied upon the doctrine of waiver, but rather are asking the Court to invoke the principle of equitable estoppel.

In *Mate v Wolverine Mut Ins Co*, 233 Mich. App 14, 23; 592 NW2d 379 (1998), the Court of Appeals stated:

“In certain circumstances, estoppel may operate to hold a defendant insurer, agent, or broker liable for coverage that differs from **383 the express terms of the contract. *Parment Homes, Inc. v. Republic Ins. Co.*, 111 Mich. App. 140, 148, 314 N.W.2d 453 (1981). Equitable estoppel arises only ‘when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.’ *Lichon v American Universal Ins Co*, 435 Mich. 408, 415, 459 N.W.2d 288 (1990) (citations omitted).”

On May 15, 2014, the Court of Appeals in an unpublished opinion in *Auto-Owners Ins Co v Robert E. McGowan Trust*; 2014 WL 2040025 (a copy of which is at Exhibit 10) stated:

“Equitable estoppel is an ‘equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract.’ *Morales v Auto-Owners Ins Co*, 458 Mich. 288, 295; 582 NW2d 776 (1998). For equitable estoppel to apply, the party seeking its application must establish that (1) a party, by representation, admissions, or silence intentionally or negligently induced another party to believe facts, (2) the other party justifiably relied and acted on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *West Am Ins Co v Meridian Mut Ins Co*, 230 Mich. App 305, 310; 583 NW2d 548(1988).”

And on May 27, 2014 the Court of Appeals in an unpublished opinion *Woodruff v State Farm Mut Auto Ins Co*; 2014 WL 2218722 (a copy of which is at Exhibit 11) stated:

Michigan courts have long recognized that a party may be equitably estopped from asserting certain facts where it would be inequitable to permit the party to do so. See *Hassberger v Gen Builder's Supply Co*, 213 Mich. 489; 182 NW 27 (1921). Courts will apply equitable estoppel when a party, by his or her acts, representations, or admissions, or by his or her silence when obligated to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and the other person rightfully relies and acts on such belief, so that he or she will be prejudiced if the former is permitted to deny the facts.

Lichon v American Universal Ins Co, 435 Mich. 408, 415; 459 NW2d 288 (1990). The doctrine of equitable estoppel is a tool to protect a plaintiff from a defense asserted by the defendant. *Charter Twp of Harrison v Calisi*, 121 Mich. App 777, 787; 329 NW2d488 (1982). And it has been applied to prevent an insurer from enforcing a provision contained in an insurance contract where the insurer waived its right to assert the provision through its course of conduct. *Morales v Auto-Owners Ins Co*, 458 Mich. 288, 295; 582 NW2d 776 (1998).”

This line of cases, from the 1998 Supreme Court decision in *Morales*, the 1998 Court of Appeals decision in *Mate* and the two unpublished 2014 Court of Appeals decisions quoted above, make it clear that:

1. When an insurer negligently causes an insured to believe facts;
2. The insured justifiably relies upon those facts; and
3. The insured is prejudiced if the insurer is allowed to deny the existence of those facts;

then the principle of equitable estoppel is applicable.

Based upon the facts discussed earlier in this Answer, it seems clear that the act of the Defendant, in renewing Plaintiffs’ homeowners policy approximately 9 months after Defendant knew (at the very least) that Plaintiffs were in the process of moving to Lansing, equitably estops Defendant from denying insurance coverage for Plaintiffs’ December 2013 water damage loss.

CONCLUSION

For the reasons stated in this Answer to Defendant-Appellant’s Application for Leave to Appeal, Plaintiffs Song Yu and Sang Chung request that the Court deny the Application.

Date: June 30, 2017



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